IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 761.

OLIN MATHIESON CHEMICAL CORPORATION,
a Corporation, Petitioner,

v.

THE WESTERN STATES CUTLERY AND MANUFACTURING COMPANY, a Corporation; H. REGINALD PLATTS, HARLOW C. PLATTS, DEBBIE C. PLATTS, LOIS M. PLATTS, and MARIAN K. PLATTS, Doing Business Under the Name and Style of WESTERN STATES CUTLERY COMPANY; and WESTERN STATES CUTLERY COMPANY, a Colorado Corporation, Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITIONER'S REPLY BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In reply to Respondents' Brief, we invite the Court's attention to a few salient points.

At page 2, Respondents call attention to Fact Findings 5 and 8. While we do not challenge the **literal** correctness of these Findings, it is important for the Court to realize that Respondents' use of the "WESTERN" and "WESTERN Boulder Colorado" marking prior to World War II was nothing more than a **token** use. Respondents' catalogs issued during the 1930's showed only one style of knife that carried the mark (see Style No. 243 pictured on page 3 of Exhibit D-1, page 26 of Exhibit D-2, and page 3 of Exhibit D-4). This style marked "WESTERN" was Respondents' most expensive knife (R. 165). It is stipulated (Supplemental Record, page 4, ¶ 6) that, of this style, Respondents sold only ten knives to their West Coast distributor during a period of nearly five years from March, 1934, to January, 1939; and the record (R. 269) shows that during the entire year of 1940 Respondents sold only twenty-two of Style No. 243.

At page 3, Respondents refer to Finding 9 which concerns their practice of showing their knives in display cases. Note that "prior to sometime in the nineteen-forties" Respondents' display cases carried the designation "Western States", not "WESTERN."

I.

In its argument (page 4) Respondent asserts that since it had been using the "WESTERN" mark for twenty-five years, and that since there was "no evidence of confusion", that there is no likelihood of confusion. Both premises are substantially wrong. The first is wrong because prior to "sometime in the nineteen-forties" they made nothing more than token (if not covert) use of the mark. The second premise is wrong because, as the Court of Appeals pointed out in its opinion (Appendix A to Petition, page 25) retailers, in making sales of Respondents' knives to Petitioner's investigators, stated:

> "that it was a good knife and that it was made by Western Cartridge Company" (Petitioner's trade name).

To say that the retailers were not confused is to say that they lied.*

Respondents' argument (that because there is no evidence of actual confusion at the consumer level, there can be no likelihood of confusion) persuaded the Trial Court erroneously to conclude as a matter of law that:

> "7. * * * The lack of actual evidence is conclusive proof that no confusion or even likelihood of confusion is present. (See Rytex Company v. Ryan et al., 126 Fed [2d] 952.)" (R. 41.)

But the Rytex case, thus cited by the Trial Court as its only authority for that conclusion, has been overruled by the very Court that wrote it (Barbasol Co. v. Jacobs, 160 F. [2d] 336, 340, C. A. 7).

II.

At page 6, Respondents assert that there is no similarity between the goods of the parties here. While they are both hunting weapons (but admittedly no one in his right mind would buy a hunting knife when he wanted ammunition or targets or traps) we urge that the controlling circumstance in confusion of source cases such as this (where the goods are specifically different) is community of the class of purchasers to whom the respective goods appeal—rather than similarity or dissimilarity of the goods themselves. In that respect, at least, the case at bar involves a clearer right to relief than either the "National" or the "North American" cases in which this Court has recently

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* Note that the Trial Court did not find that there was no evidence of confusion—only that there was no evidence that "any individuals of the purchasing public were confused."

denied writs on the petition of the infringers. Questions 1 and 2, here presented, pose that very issue.

Unlike Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70, there has been no intervening statutory enactment to render the questions here presented "abstract or academic."

III.

It is fairly apparent that the Court of Appeals decided this case on a basis alien to the Trade-Mark Act of 1946. Like the District Court, the Court of Appeals originally held the evidence "was not sufficient to establish confusion in the minds of the buying public." The opinion said not a word about "likelihood of confusion", and not a word about the Trade-Mark Act of 1946, until it was amended after Petition for Rehearing, as shown by the italics in Appendix A to the Petition for the Writ (and as shown in handwriting on the certified copy of the opinion filed with the Petition for the Writ). The very nature of the amendments suggests that the Court of Appeals considered the difference between the Act of 1946 and the Act of 1905 to be one of words—not substance. We think the Congress clearly intended a substantive difference, and we ask this Court to confirm it.

IV.

At pages 8-9, Respondents mistakenly say:

> "There was no question in—Safeway Stores v. Dunnell (172 F. (2d) 649) as to the question of the right to use a trade-mark."

But the last paragraph of the majority opinion in the Safeway v. Dunnell case is sufficient to show the contrary:

> "The judgment denying Stores' claim for a permanent injunction against Dunnell's use of the words

Safe Way is reversed and the district court ordered to render such an injunction" (p. 656).

The cases cited by Respondents show a clear conflict between the Third and Ninth Circuits on the one hand, and the First and Seventh Circuits on the other. Hence, the need for clarification by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the questions presented by the Petition are of sufficient public importance to deserve this Court's consideration, and it is accordingly submitted that the Petition for the Writ should be granted.

Respectfully submitted,

JOHN H. SUTHERLAND,
Counsel for Petitioner.

St. Louis, Missouri,
May 8, 1956.